MULTI-PURPOSE BANK BHD

v.

DIAMOND AGREEMENT SDN BHD & ANOR

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[ORIGINATING SUMMONS NO: 24-1089-98]
7 MAY 1999

LAND LAW: *Charge - Order for sale - Cause to the contrary - What is the duty of the court when deciding an application for order for sale - What must the court consider in determining whether there is cause to the contrary - What amounts to cause to the contrary*

LAND LAW: *Charge - Order for sale - Particulars to be stated in affidavit-in-support - Whether particulars prescribed by O. 83 r. 3 Rules of the High Court 1980 must be fulfilled to the letter - Whether particulars must be in first affidavit-in-support - Total amount due on date of order stated by chargee - Whether mandatory to state this amount - Whether "amount of the interest in arrear at the date of the affidavit" must be stated - Whether failure to so state amounts to cause to the contrary - Rules of the High Court 1980, O. 83 r. 3(3)(b) - National Land Code 1965, s. 257(1)(c)*

LAND LAW: *Charge - Order for sale - Default in repaying overdraft facility - Whether originating summons and affidavit in support must state "amount of instalments in arrear" - Whether there are no instalment payments in respect of overdraft facility which is repayable on demand - Rules of the High Court 1980, O. 83 r. 3(3)(b)*

CIVIL PROCEDURE: *Affidavits - Affidavit-in-support affirmed before filing of originating summons - Whether affidavit a nullity - Whether there must be total observance of O. 41 r. 1 Rules of the High Court 1980 - Whether minute divergences may be tolerated - When may an affidavit affirmed before filing of originating summons be admissible*

This was an application under s. 256 of the National Land Code 1965 ('the NLC') for an order for sale of a particular plot of land charged to the plaintiff to secure an overdraft facility. The plaintiff's first affidavit, affirmed on 29 September 1998, stated the amount due on the overdraft account as at 1 August 1998 and the accruing interest thereafter. The originating summons which was issued on 30 September 1998 stated likewise. Subsequent affidavits were filed stating the amount due as at each of the dates fixed for hearing and the accruing interest thereafter.

The defendants resisted this application based on two grounds. The first was related to the contention that the procedural requirements prescribed by O. 83 r. 3(3) of the Rules of the High Court 1980 ('the RHC') had not been complied with. The defendants asserted that the O. 83 r. 3(3) particulars must be fulfilled to the letter and that this must be done in the first affidavit but, however, the plaintiff's first affidavit had not furnished the same. In particular, the defendants contended that O. 83 r. 3(3)(c) of the RHC was not complied with since the plaintiff had not stated (i) the "amount of instalments in arrear at the date of issue of the originating summons and at the date of the affidavits"; and (ii) the "amount of the interest in arrear at the date of the affidavits". The second ground relied on by the defendants was that the first affidavit was a nullity since it was affirmed before the originating summons was filed.

Held:

[1] In an application for an order for sale by a chargee made in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure, and it has to be noted that a chargee so applying is only exercising his right as chargee, the court shall order the sale of the land or lease to which the charge relates, "unless it is satisfied of the existence of cause to the contrary." By the expression "cause to the contrary", the court is required to decide whether there are circumstances sufficient to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved. It is for the chargor to show cause either in law or equity against an application for sale. The chargor must adduce evidence by affidavit to discharge that onus.

[2] Order 83 of the RHC undoubtedly applies to an action by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the reliefs mentioned in O. 83 r. 1(1)(a) - (g) of the RHC. However, O. 83 of the RHC does not apply wholesale to an action in which there is a claim for any of those seven reliefs. Based on the reasoning in the case of *Citibank NV v. Ibrahim Othman* which was endorsed by the Federal Court in *Maimunah Megat Montak v. Mayban Finance Bhd*, a chargee applying under s. 256 of the NLC for an order for sale of the chargor's land must provide the particulars listed in O. 83 r. 3(3) of the RHC. The former case, however, provided that it is not imperative for the chargee to fulfill the O. 83 r. 3(3) particulars to the letter nor is it necessary for the said particulars to be included in the chargee's first affidavit.

[3] The plaintiff could not have stated the "amount of instalments in arrear", as the defendants were not given an advance repayable by fixed instalments. Rather, the defendants were permitted, as is in the nature of an overdraft, to overdraw within a prearranged limit. Also, the sum overdrawn was repayable on demand. Therefore, there could not have been any "amount of the instalments in arrear at the date of issue of the originating summons and at the date of the affidavits" to have been stated in the originating summons or in the affidavits.

[4] Given that the provisions of s. 257(1)(a) - (d) of the NLC are mandatory, it is absolutely essential that chargees state the "total amount due as at the date on which the order is to be made", so that the court may specify the total amount due to the chargee at the date on which the order is made. It is imperative, therefore, that chargees state the aggregate sum of the principal and overdue interest due at the date on which the order is made. Indeed, given that the "state of the account between the chargor and chargee at the date on which the order is made" is the aggregate sum of the principal and overdue interest due on the date the order is made rather than the aggregate sum of the principal and overdue interest due at the date of the affidavit, knowledge of the "amount of the interest in arrear at the date of the affidavit" or absence thereof has no real significance. Rather, it is knowledge of the principal and overdue interest due at the date on which the order is made that holds real significance. In the present case, the defendants had not been deprived of that knowledge. They knew and they know the exact amount outstanding under the charge. The defendants had not been deprived of any opportunity to repay the defendant. Therefore, the plaintiff's failure to state the "amount of the interest in arrear at the date of the affidavit" had not prejudiced the defendants and there was no cause to the contrary.

[5] By O. 28 r. 3(3) of the RHC, a plaintiff must serve his affidavit not less than four days before the hearing. It follows that a plaintiff must, not less than four days before the hearing, make and file his affidavit. Or else, it would not be possible to serve his affidavit not less than four days before the hearing. A plaintiff is therefore compelled, by the "not less than four days' service" of the affidavit rather than by the time fixed by the rules for affirming the affidavit, to have his affidavit affirmed not less than four days before the hearing. But there is no rule that says that a plaintiff who intends to adduce evidence in support of an originating summons at the first hearing, must do so by affidavit affirmed only after the cause or matter has been instituted. An affirmation which precedes the filing of the originating summons is not necessarily not in order.

[6] Order 41 r. 1(1) of the RHC mandates that an affidavit sworn in a cause or matter must bear the title of that cause or matter. While it is necessary that every affidavit sworn in a cause or matter must be entitled in that cause or matter, strict and total observance is not *sine qua non*. Minute divergences are tolerated and are covered by O. 41 r. 4 of the RHC. As a matter of fact, O. 41 rr. 1(2) and 1(3) of the RHC allow abridgement of the title of an affidavit. But it is fatal, in the sense that the affidavit would not be admitted, if the title is so deviant that it gives rise to a serious doubt as to whether the affidavit was indeed sworn in that cause or matter or in some other cause or matter. In the present case, that could not be doubted as both the originating summons and the affidavit are identically entitled – parties, case number, subject matter and all. Undoubtedly, the affidavit was properly entitled to the letter and spirit of the law.

[Application allowed.]

Case(s) referred to:

Arab-Malaysian Merchant Bank Bhd v. City Properties Sdn Bhd [1992] 4 CLJ 2123 ***(refd)***

Arab Malaysian Finance (M) Bhd v. Serajudin Mohd Ismail [1999] 6 CLJ Supp 405 ***(not foll)***

Asia Commercial Finance (M) v. Kimden Housing Development Sdn Bhd [1993] 1 CLJ 487 ***(refd)***

Chan Chin Min & Anor v. Lim Yok Eng [1994] 3 CLJ 687 ***(refd)***

Chin Choy & Ors v. Collector of Stamp Duties [1979] 1 MLJ 69 ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(foll)***

Creswell v. BOC Ltd [1980] 3 All ER 443 ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511 ***(refd)***

H Stacey v. Diamond Metal Products Co Ltd & Anor [1935] MLJ 248 ***(dist)***

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384 ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Ors [1989] 1 MLJ 457 ***(refd)***

Kewangan Bersatu Bhd v. Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79 ***(refd)***

Lau Yeok Lin & Ors v. Hip Soon Engineering & Construction Sdn Bhd [1988] 2 CLJ 76 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

Magor & St Mellons RDC v. Newport Corporation [1952] AC 189 ***(refd)***

Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 ***(refd)***

Malayan Banking Bhd v. Dagang Bina Sdn Bhd [1991] 3 CLJ 1739 ***(refd)***

Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 MLJ 257 ***(refd)***

Maunsell v. Ollins [1975] AC 373 ***(refd)***
Melvill v. The Master [1984] 3 SA 387 ***(refd)***
Overseas Union Bank Ltd v. Lee Guat Cheow & Co Sdn Bhd [1987] 1 MLJ 51 ***(refd)***
Perwira Affin Bank Bhd v. Tan Tian Ser [1995] 2 CLJ 133 ***(refd)***
Re An Advocate [1964] 30 MLJ 1 ***(refd)***
Sunprinting and Publishing Association v. Remington Paper and Power Co Inc [1923] 130 NE 470 ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(refd)***
The Sri Melati [1976] 1 MLJ 283 ***(refd)***
United Hokkien Cemetries Penang v. The Board, Majlis Perbandaran Pulau Pinang [1979] 2 MLJ 121 ***(refd)***
Van Vranken v. Helvering 115 F 2d 709 ***(refd)***
West Coast Hotel Co v. Parish 300 US 379 ***(refd)***

Legislation referred to:
Civil Procedure Rules 1934, O. 35 r. 1(1), O. 38 r. 1
National Land Code 1965, ss. 256(2), (3), 257(1)(a-d)
Rules of the High Court 1980, O. 38 rr. 2(3), 3(3), O. 83 r. 3(1), (3)(b), (c)

Other source(s) referred to:
The Interpretation of Statutes, Lourens M du Plessis, para 27
The Supreme Court Practice 1997, para 41/1/2

For the plaintiff - TG Chua; M/s Ban Eng Annual & Foong
For the defendants - Kiley Tan; M/s Lim Kean Siew & Co

Reported by S Dharmendran

JUDGMENT

Jeffrey Tan J:

Essentially, this is the plaintiff/chargee's application (encl. 2) for an order for sale, under s. 256 of the National Land Code 1965 (Code), of the 2nd defendant/3rd party chargor's land held under Geran 21213 for Lot 426, Seksyen 4, Bandar Georgetown, Daerah Timur, Pulau Pinang (hereinafter referred to as the said land).

The pertinent background facts, as could be expected in a charge action, are as follows. As said, the 2nd defendant is the registered proprietor of the said land. The plaintiff agreed, by an agreement dated 21 December 1996 (exh. "CCH2") between the plaintiff as lender of the one part and the 1st defendant as borrower of the other part, and in consideration, *inter alia*, of the security of a third party first legal charge over the said land, to grant various banking facilities, subject to the limit of RM5,700,000, to the 1st defendant. Pursuant to the terms of said agreement, the 2nd

defendant created, on 21 December 1996, a third party first legal charge (Gadaian bertarikh 21 December 1996 Perserahan No. 24564/96 Jilid 721 Folio 6) over the said land in favour of the plaintiff. By the same said charge, the 2nd defendant as principal debtor covenanted, *inter alia*, "to pay and satisfy the (plaintiff) on demand, in full all monies which are owing and payable by the (1st defendant) under the said agreement or such amount thereof as may be outstanding under the agreement including all whatever interest, costs and charges ... ."

And as in other charge actions, the plaintiff asserted, in the affidavit (encl. 1) affirmed by one Chee Chin Hoe on 22 September 1998, in support of the application, that the 1st and 2nd defendants had defaulted on the charge. According to the facts asserted in encl. 1, (i) the plaintiff demanded from the defendants and from three other guarantors (Fong Wa Tan, Ng Sim Hock & Koh Aun Choo), by notice of demand dated 19 August 1998 (exh. "CCH4"), for the payment within 14 days of the sum of RM4,277,151.30 (the sum allegedly owing on the 1st defendant's overdraft account as at 1 August 1998) together with interest thereon, (ii) the plaintiff notified the defendants and three guarantors, that legal proceedings for recovery would be commenced against them, if payment was not made, (iii) the defendants failed, refused and or neglected to comply with the said notice of demand, (iv) the plaintiff issued the statutory notice of default with respect to a charge, dated 8 September 1998 (exh. "CCH5"), to the 2nd defendant, and, that the defendants failed, refused and or neglected to comply with the said statutory notice. According to the latest affidavit (encl. 9) filed by the plaintiff, the outstanding principal and interest, as at this day, 7 May 1999, is RM4,690,233.06.

But unlike most other contested charge actions, the defendants elected not to file any affidavit evidence. Mr Kiley Tan, for the defendants, raised instead the following issues to weather the plaintiff's application. Referring to O. 83 r. 3(3)(b) of the Rules of the High Court 1980, he said that encl. 1 must state the r. 3(3) particulars and prove that money is due and payable. He also said, (i) that the plaintiff had not proved that money is due and payable, (ii) that the plaintiff "has not shown the interest as at the date of issue of the originating summons", (iii) that encl. 1 (the supporting affidavit) is defective, as it has not complied with O. 83 r. 3(3)(c), and, (iv) that encl. 1, since it was affirmed before the originating summons was filed, is not an affidavit. With regard to his submission that encl. 1 is not an affidavit, Mr Tan submitted the High Court decision of *Arab Malaysian Finance (M) Bhd. v. Serajudin bin Mohd Ismail* [1999] 6 CLJ Supp 405; [1999] 1 AMR 118. "Rules must be followed", he said. "In Penang High Court 22-777-1998, a related action between this plaintiff,

the defendants here and three guarantors, one of the defendants is alleging fraud and illegality. If the court should find that the contract is illegal, then this charge would have no leg to stand on". Mr Tan added, in the same breath, that the defendants are not alleging any fraud or illegality in this proceedings.

Mr T.G. Chua, for the plaintiff, contended that no cause to the contrary has been shown. "(Because of the defendants' failure) to file an affidavit", he said, "there is no evidence, except that of the plaintiff". The plaintiff had complied with O. 83, and the defendants were aware of the amount outstanding. Mr Chua remonstrated that Mr Tan had submitted on facts unsupported by any affidavit evidence.

With regard to an application for an order for sale by the chargee made in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure, and it has to be noted that a chargee so applying is only exercising his right as chargee (*Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 MLJ 257; *Arab-Malaysian Merchant Bank Bhd. v. City Properties Sdn. Bhd.* [1992] 4 CLJ 2123; *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332; [1994] 1 MLJ 119), it is settled, that the court shall order the sale of the land or lease to which the charge relates, "unless it is satisfied of the existence of cause to the contrary" (see s. 256(2) and s. 256(3) of the National Land Code 1965). "Section 256(3) of the National Land Code is mandatory. The court shall order a sale unless it is satisfied of the existence of 'cause to the contrary'." (*Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors* [1989] 1 MLJ 457).

The court is required, by the expression "cause to the contrary", to decide whether there are circumstances sufficient to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved (*Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors* [1983] 2 MLJ 384). Even "granted that these words have been construed as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they [do not] extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly" (*Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors* [1989] 1 MLJ 457).

But it is for a chargor to "shew cause" either in law or equity against an application for sale (*Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors (supra)*; *Overseas Union Bank Ltd v. Lee Guat Cheow & Co. Sdn. Bhd.* [1987] 1 MLJ 51). The chargor must adduce evidence by

affidavit to discharge that onus (*Overseas Union Bank Ltd v. Lee Guat Cheow & Co. Sdn. Bhd.*)

The role of the judge when dealing with applications under s. 256, so the Federal Court per Gopal Sri Ram propitiously explained in *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 1 MLJ 77, 88, 89, is as follows:

> A judge hearing an application .... is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the narrow question whether the material produced before him by the chargor constitutes cause to the contrary.
>
> In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.
>
> On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction ...
>
> Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this court has been faced on numerous occasions. An application under s. 256 is opposed by the chargor on the ground that the chargee has acted in breach of the contract, eg by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the moneys paid by the borrower. A judge faced with such complaints will merely say that they do not, on a proper reading of s. 256(3) and the authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all the complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of the law by a failure on the part of those concerned with the task of dealing with applications under s. 256 to properly appreciate their true role assigned to them by Parliament.

At p. 89, the Federal Court further explained:

.... an order for sale made pursuant to s. 256 of the Code is not a judgment. That was settled by the decision of the Supreme Court in M*alaysian International Merchant Bankers Bhd v. Dhanoa Sdn. Bhd* [1988] 1 MLJ 257, where Seah SCJ speaking of an order for sale said (at p. 258):

> Here, there was no judgment debt. The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not a covenant but under the registered charge.

In *Kandiah Peter v. Public Bank Bhd* [1994] 1 MLJ 119, the Supreme Court affirmed this principle and held that the making of an order for sale upon the failure of a chargor did not bar a subsequent action *in personam* brought by the chargor based upon the same facts that did not avail him in opposing the application under s. 256. Eusoff Chin SCJ (as his Lordship the Chief Justice then was) set out the relevant law in the following terms:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment. The court hearing the application for foreclosure does not make, and in any event ought not to make, adjudication upon any substantive issue ....

"Cause to the contrary" may be established, so as the Federal Court imparted in *Low Lee Lian v. Ban Hin Lee Bank Bhd.* only in the following three categories of cases:

(a) where a chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the NLC;

(b) where the chargor is able to demonstrate that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; or,

(c) where the chargor is able to demonstrate that the order for sale would be contrary to some rule of law or equity.

In the instant case, the fact sworn by the plaintiff that the plaintiff had given the appropriate statutory notice as stipulated in the code is not in dispute. The defendants contended though, through the oral submission of counsel, that the plaintiff, in encl. 1, had not furnished the required

particulars and proved that money is due and payable, and therefore had not complied with the procedural requirements prescribed by O. 83 r. 3(3)(b), which reads as follows:

> Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of –
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;
>
> (c) the amounts of the interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
>
> (d) the amount remaining due under the charge.

Order 83 undoubtedly applies to an action by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs namely, (a) payment of moneys secured by the charge; (b) sale of the charge property; (c) foreclosure; (d) delivery of possession to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property; (e) redemption; (f) reconveyance of the property or its release from the security; (g) delivery of possession by the chargee.

Still, O. 83 does not apply wholesale to an action in which there is a claim for any of those seven reliefs. Rule 2 applies where in a charge action begun by originating summons, being an action in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured or both, "the defendant fails to enter an appearance" – see O. 83 r. 2(1). Rule 3 applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured or both – see O. 83 r. 3(1). Sub-r. 3(3) applies where the plaintiff claims possession, or where the court in any case or class otherwise directs. And "where O. 83 r. 3(3) applies, the affidavit must show the state of the account between the chargor and chargee with particulars of the amount of the advance, the repayments, the interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit and the amount remaining due under the charge. **This rule applies where the plaintiff claims delivery of possession**" (*Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608, 611, per Mahadev Shankar J, as he then was) (bold added).

In *Citibank NV v. Ibrahim bin Othman,* the chargee applied, under s. 256, for an order for sale of the defendant's land. The chargor challenged the amount claimed and the manner in which interest was varied and or calculated. Citibank's counsel submitted that since it was a foreclosure action, O. 83 r. 3(3) did not apply. He submitted that O. 83 r. 3(3) only applies where the plaintiff claims delivery of possession, and that O. 83 r. 3(6) only applies where a plaintiff claims payment of moneys secured by a charge. But agreeing with Abdul Razak J in *Malayan Banking Bhd v. Dagang Bina Sdn. Bhd.* [1991] 3 CLJ 1739, Mahadev Shankar J held that it was incumbent on Citibank to provide the r. 3(3) particulars in the first affidavit. Likewise, in *Asia Commercial Finance (M) v. Kimden Housing Development Sdn Bhd* [1993] 1 CLJ 487; [1993] 1 MLJ 283, James Foong J held that a chargee seeking an order for sale must provide the r. 3(3) particulars. Indeed, any conflict of judicial opinion, as to the applicability of the provisions of O. 83 r. 3, to an application under s. 256 for an order for sale, as had appeared in *Citibank NA v. Ibrahim bin Othman* on the one hand, and *Perwira Affin Bank Berhad v. Tan Tian Ser* [1995] 2 CLJ 133, has been settled in *Maimunah bte Megat Montak v. Mayban Finance Berhad* [1996] 3 CLJ 9, where the Federal Court decidedly "preferred" the reasoning and conclusion of Mahadev Shankar J. It is ineluctable that the plaintiff must provide the r. 3(3) particulars.

Mr Chua contended that the plaintiff had provided the r. 3(3) particulars. Mr Tan argued that the plaintiff must fulfil r. 3(3), as it were, to the letter. But evidently, Mr Tan had not read, with respect, the entire judgment of *Citibank NA v. Ibrahim bin Othman,* although Mr Tan referred to the authority, for at p. 615, Mahadev Shankar J said:

> It is to be noted that O. 83 r. 3(3) gives the court the power to dispense with the statutory particulars in any case or class. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date and at least one further affidavit is of the order. Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the Defendant.

Further down, at pp. 615 and 616, Mahadev Shankar J made it crystal clear, that an application under s. 256 for an order for sale would not perforce be struck out for not fulfilling r. 3(3) to the letter:

> What the chargor has lost where there is a failure to comply with O. 83 r. 3(3) is the opportunity to satisfy himself of the correctness if he is not. A bare denial of a debt was never enough. The chargor also has an onus if he denies the amount claimed to say how much he admits owing. In this

kind of case, the dismissal of the application for non-compliance with some aspect of the rules does not extinguish the debt. The chargee can start afresh but there will then be additional costs, interest and delay.

This is the very situation which O. 2 r. 1(2) of the RHC was meant to cater for. The question is whether the failure to comply with the rules can be cured by setting aside the proceedings in whole or in part or by allowing some amendments to be made, all of which much be on such terms as to costs or otherwise as the court thinks just.

Lest it has been forgotten, the order for sale was not granted in *Citibank NA v Ibrahim bin Othman*, because Citibank had not stated the correct particulars, despite the several affidavits filed, and not because Citibank had not fulfilled the r. 3(3) particulars to the letter or in the very first affidavit.

In the present case, the plaintiff filed five affidavits. In encl. 1 affirmed on 29 September 1998, the plaintiff stated that RM4,277,151.30 was due and owing on the overdraft account as at 1 August 1998. In the originating summons issued on 30 September 1998, the plaintiff stated likewise that RM4,277,151.30 was due and owing on the overdraft account as at 1 August 1998. In encl. 6 affirmed on 3 February 1999, the plaintiff stated that RM4,563,414.34 would be due and owing on 8 February 1999 (the first date for hearing of the application). In encl. 7 affirmed on 19 April 1999, the plaintiff stated that RM4,674,588.72 was due and owing as at 26 April 1999 (the next date for hearing). In encl. 8 affirmed on 29 April 1999, the plaintiff stated that RM4,680,225.08 was due and owing as at 30 April 1999 (the next date for hearing). And in encl. 9 affirmed on 4 May 1999, the plaintiff stated that RM4,690,233.06 was due and owing as at 7 May 1999 (the current date). In each of the aforesaid affidavits, the plaintiff exhibited a current statement of account with particulars of the principal amount of the overdraft owing, the amount of interest in arrear as at the date of the first affidavit, the amount of interest in arrear at the date of issuance of the originating summons, the amount outstanding as at each of the dates fixed for hearing of this application, and the amount of daily interest. Evidently, Mr Tan was wrong on the plaintiff having not stated the amount of interest in arrear as at the date of the originating summons.

Was Mr Tan also wrong on the plaintiff having not complied with r. 3(3)(c)?. At first blush, it would appear that the plaintiff had not stated the "amount of instalments in arrear at the date of issue of the originating summons and at the date of the affidavits". But the plaintiff could not have stated the "amount of instalments in arrear", as the defendants were not

given an advance repayable by fixed instalments. Rather, the defendants were permitted, as is in the nature of an overdraft, to overdraw within a prearranged limit. Also, the sum overdrawn was repayable on demand. There just could not have been any "amount of the instalments in arrear at the date of issue of the originating summons and at the date of the affidavits" to have been stated in the originating summons or in the affidavits.

Again at first blush, it would appear that the plaintiff had not stated the "amount of the interest in arrear at the date of the affidavits". In encl. 1 and originating summons, the plaintiff stated that interest shall be levied on the sum due as at 1 August 1998 at the rate of 2% p.a. above the base lending rate (then at 12% p.a.) on the approved overdraft limit and 4% above the base lending rate (then at 12% p.a.) on the amount in excess of the approved overdraft limit, from 1 August 1998 to date of settlement. In encl. 6, the plaintiff stated that interest shall be levied on the sum due as at 8 February 1999, at the rate of 3.5% p.a. above the base lending rate (then at 8.05% p.a.). In encl. 7, the plaintiff stated that interest shall be levied on the sum due as at 26 April 1999, at the rate of 3.5% p.a. above the base lending rate (then at 7.65%). In encl. 8, the plaintiff stated that interest shall be levied on the sum due as at 30 April 1999, at the rate of 3.5% above the base lending rate (then at 7.65%). And in encl. 9, the plaintiff stated that interest shall be levied on the sum due as at 7 May 1999, at the rate of 3.5% above the base lending rate (then at 7.65%). Apparently, the plaintiff stated the sum due as at the respective hearing dates, and the accruing interest thereafter, but not the "amount of the interest in arrear at the date of the affidavits". Yet, to be fair, it must be asked, if that omission is of any consequence.

Section 257(1) of the Code stipulates that "every order for sale made by the court under s. 256 shall:

(a) provide for the sale to be by public auction;

(b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;

(c) specify the total amount due to the chargee at the date on which the order is made; and

(d) require the registrar of the court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.

Given that the provisions of s. 257(1)(a - d) are mandatory (*Maimunah bte Megat Montak v. Mayban Finance Berhad*), it is absolutely essential, de rigueur really, that chargees state the "total amount due as at the date on which the order is to be made", so that the court could specify the total amount due to the chargee at the date on which the order is made. It is imperative, therefore, that chargees state the aggregate sum of the principal and overdue interest due at the date on which the order is made. But affidavits are made, as a matter of practice, before the date of the hearing, or they could not be served before the hearing. Thus, almost always, invariably, the "amount of the interest in arrear at the date of the affidavits" is less than the "total overdue interest due as at the date on which the order is made". But s. 257(1)(c) of the Code requires the court to specify the total amount due to the chargee at the date on which the order is made. That proposes that the "amount of the interest in arrear at the date of the affidavits", which is almost always less than the "total overdue interest due as at the date on which the order is made", is really picayune. Indeed, given that the "state of the account between the chargor and chargee at the date on which the order is made" is the aggregate sum of the principal and overdue interest due at the date on which the order is made rather than the aggregate sum of the principal and overdue interest due at the date of the affidavit, knowledge of the "amount of the interest in arrear at the date of the affidavit" or absence thereof has no real significance. Rather, it is knowledge of the principal and overdue interest due at the date on which the order is made that holds real significance. In the present case, the defendants had not been deprived of that knowledge. They knew and they know the exact amount outstanding under the charge. The defendants had not been deprived of any opportunity to repay the overdraft. The plaintiff's failure to state the "amount of the interest in arrear at the date of the affidavit" had not prejudiced the defendants. There is no cause to the contrary. There is only evidence (encl. 9) that the sum of RM4,690,233.06 is due and owing under the charge. Uncontroverted and unopposed, encl. 9 must be irrefragable evidence of the correct amount due at this moment.

On beam-ends but to his credit yet not giving in, Mr Tan nonetheless contented that encl. 1, since it was affirmed before the originating summons was filed, is not an affidavit. Indeed, it was held, in *Arab Malaysian Finance (M) Bhd. v Serajudin bin Mohd Ismail*, to the effect that an affidavit affirmed without the case number relating to the cause or matter is a "nullity". But is such an affidavit a "nullity"?

Speaking generally, evidence is adduced, in originating summons proceedings, by affidavits (see O. 38 r. 2(3). O. 28 r. 3(3) states:

> Where the plaintiff intends to adduce evidence in support of an originating summons at the first hearing thereof he must do so by affidavit and, not less that 4 clear days before the hearing, serve a copy thereof on every defendant who has entered an appearance or, if the summons is one to which appearance is not required, on every defendant who has been served with summons.

Needless to say, the language is the point of entrance into the meaning of O. 28 r. 3(3). "The starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification ..." (*Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] 2 MLJ 35 per Abdoolcader SCJ). And the language of O. 28 r. 3(3) is clear and unambiguous: a plaintiff who intends to adduce evidence in support of an originating summons at the first hearing, must do so by affidavit, and, not less that four clear days before the hearing, serve a copy of the affidavit on every defendant who has entered an appearance or, if the summons is one to which appearance is not required, on every defendant who has been served with summons. Put into practice, this means, that a plaintiff, who must not less than four days before the hearing serve his affidavit, must also not less than four days before the hearing, make and file his affidavit. Or else, his affidavit could not be served not less than four days before the hearing. A plaintiff is therefore compelled, by the "not less four days' service" of the affidavit rather than by the time fixed by the rules for affirming the affidavit, to have his affidavit affirmed not less than four days before the hearing. But there is no rule that says that a plaintiff who intends to adduce evidence in support of an originating summons at the first hearing, must do so by affidavit affirmed only after the cause or matter has been instituted. An affirmation which precedes the filing of the originating summons is not necessarily not in order (*Kewangan Bersatu Berhad v. Metropolitan Property Holdings Sdn. Bhd.* [1996] 1 MLJ 79) (see also Supreme Court Practice 1997 para 41/1/4).

Admittedly, it was held, in *H Stacey v. Diamond Metal Products Co. Ltd & Anor* [1935] MLJ 248, that "affidavits to be used in court proceedings can only be sworn and filed in proceedings that are actually pending". But it was so held in the context of an action begun by writ, (i) in which it was the procedure (O. 35 r. 1(1) of the Civil Procedure Rules 1934), and also now (O. 38 r. 1), that any fact required to be proved at the trial shall be proved by the examination of witnesses orally and in open court, and proof by affidavit at the trial was, and also now, an exception to the norm.

However, in this action begun by originating summons, affidavit evidence is a matter of course (O. 38 r. 2(3).

Moreover, the rules providing for the admission of affidavit evidence are no longer the same. In the case of *Stacey*, the court was not given any discretion, when the witness could be produced, to admit his evidence on affidavit if the opposite party objects (O. 35 r. 1(3) of the Civil Procedure Rules 1934). Presently, in an action begun by writ, the court has a discretion, to admit the affidavit of any witness, even if the opposite party objects.

Furthermore, in the case of *Stacey*, the affidavit of J.F.S. Hunter endorsed upon a letter written by Hunter to the 1st defendant company on 12 July 1934 was not received in evidence at the trial in proof of the several facts thereon set out, for more reasons than just the one that it was not sworn and filed in proceedings that are actually pending. Apart from the reason that the affidavit of Hunter could not be resworn, because Hunter was dead, Terrell J made it absolutely clear, at p. 250, that his Lordship would not have admitted the affidavit of Hunter, even if it was sworn since the commencement of the proceedings, as the objection that the plaintiff would not have had the opportunity of cross-examination could not be overcome. The present rules, again no longer the same, provide that deponents, unless the court otherwise orders, shall not be subject to cross-examination.

Given those profound distinctions, the case of *Stacey*, as any authority under the present rules, that an affidavit must be sworn in a pending matter, must be called in question. Not surprisingly, therefore, the case of *Stacey*, whenever it was submitted as authority for the long bandied proposition that an affidavit must be sworn in a pending matter, has always been distinguished (see *The Sri Melati* [1976] 1 MLJ 283, 285; *Lau Yeok Lin & Ors. v Hip Soon Engineering & Construction Sdn Bhd* [1988] 2 CLJ 76; [1988] 2 MLJ 328, 310: *Kewangan Bersatu Berhad v. Metropolitan Property Holdings Sdn Bhd*).

Appropriately so, in *Arab Malaysian Finance (M) Bhd. v. Serajudin bin Mohd Ismail*, the case of *Stacey* was passed by. Yet strangely, the result reached was the same. Riveting his attention to O. 41 r. 1(1), the learned judge enunciated, that every affidavit must be intituled, that for an affidavit to be properly intituled the case number relating to the cause or matter must be present, that an affidavit affirmed before the originating summons was filed is not an affidavit affirmed in an existing cause or matter, that "the filing of such an affidavit cannot be treated as an irregularity that can be cured", and, that such an affidavit, even beyond *Stacey*'s inadmissibility, is a nullity.

As said, the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question. "... the meaning of an enactment must first be penetrated through the medium or vehicle of language; thereafter it is contextualized" (*The Interpretation of Statutes*, Lourens M du Plessis, para 29). Although it has been said that "this literal method of construction is now completely out of date" (*United Hokkien Cemetries Penang v. The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121 per Chang Min Tat FCJ), the first canon of construction – the literal rule – is to give the "ordinary, plain and natural meaning" of the words contained in a statue (see *Creswell v. B.O.C. Ltd.* [1980] 3 All ER 443). "Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rule of grammar": *Chin Choy & Ors v. Collector of Stamp Duties* [1979] 1 MLJ 69 per Chang Min Tat FJ. Once the language of an enactment is clear and unambiguous, and "it is assumed that the legislature used them in the popular sense, unless they have acquired a different technical meaning in legal nomenclature or unless the context or subject matter clearly shows that they were intended to be used in a different case" (*Melvill v. The Master* [1984] 3 SA 387 C 394), it should be adhered to as the final and authentic expression of the intention of the legislature and in consequence as representing the true meaning of the enactment. "... the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed (see *Magor & St. Mellons RDC v. Newport Corporation* [1952] AC 189 at 191). The court has no power to change any words used by the legislature. Further, where the words are simple and clear, it is the duty of the court of law to give those words their natural meaning even though such interpretation leads to apparent anomalies" (*Tan Boon Kean v. PP* [1995] 4 CLJ 456; [1995] 3 MLJ 514 per Mohd Azmi FCJ). "... the duty of the court is simply to give effect to the will of Parliament as expressed in the law. 'The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation'. (See *West Coast Hotel Co. v Parish*, 300 US 379 at 404 [1937] per Sutherland J) Similarly, Cardozo J said in Sunprinting and *Publishing Association v. Remington Paper and Power Co. Inc.* 130 NE 470, at 471 [1923]: 'We are not at liberty to revise while professing to construe'." (*Chan Chin Min & Anor v. Lim Yok Eng* [1994] 3 CLJ 687 per Edgar Joseph Jr FCJ). There will be a departure from the literal rule only where "the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute" (*Cross, Statutory Interpretation* [1987] p. 47) or "would produce a result repugnant to the

other provisions of the ordinance and defeat their purpose, including one of the principal purposes of the Ordinance" (*Re An Advocate* [1964] 30 MLJ 1 per Wylie CJ) or would give rise to an absurd and unjust situation (*Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35). Words would then be read in any secondary meaning which they are capable of bearing, "so as to obviate the injustice, absurdity, anomaly or contradiction or fulfil the purpose of the statute" (*Maunsell v. Olins* [1975] AC 373 at 391 per Lord Simon). It is also a basic canon of construction, because enactments are not aimed at achieving unjust and inequitable results, that if more than one construction of a provision is logically possible, the more just and equitable construction is to be preferred (*The Interpretation of Statutes*, Lourens M du Plessis, para 27). Perhaps, ultimately, it is all a matter of common sense. After all, "laws are made for men of ordinary understanding, and should therefore be construed by the ordinary rules of common sense. Their meaning is not to be sought by metaphysical subtleties, which may make anything mean everything or nothing, at pleasure" (Thomas Jefferson, Letter to Wiliam Johnson, 12th June 1823, in Works of Thomas Jefferson 7:279, H.A. Washington ed 1854).

Order 41 r. 1(1), reads as follows:

> Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.

Unquestionably, the ordinary, plain and natural meaning of "entitled", in the context of the phrase "every affidavit sworn in a cause or matter must be entitled in that cause or matter" when considered as a whole, is "intituled", or more simply, "titled". Consequently, the phrase "every affidavit sworn in a cause or matter must be entitled in that cause or matter" reads as "every affidavit sworn in a cause or matter must be intituled or titled in that cause or matter". In other words, O. 41 r. 1(1) mandates that an affidavit sworn in a cause or matter must bear the title of that cause or matter. That is the clear meaning of O. 41 r. 1(1). It is just plain good sense that an affidavit sworn in a cause or matter and intended to be adduced in that cause or matter, should bear the title of that cause or matter. With respect, this is just a case, "where one is more likely to reach the truth by an unanalysed and intuitive conclusion from the text as a whole, than by following step by step the accredited guides" (*Van Vranken v. Helvering* 115 F 2d 709, 711 (2d Cir 1940) per Learned Hand).

While it is necessary that every affidavit sworn in a cause or matter must be entitled in that cause or matter, strict and total observance is not sine qua non. Minute divergences are tolerated, and are covered by r. 4 (see *The Supreme Court Practice* 1997 para 41/1/2). As a matter of fact, r. 1(2) and r. 1(3) allow abridgement of the title of an affidavit. But it is fatal, in the sense that the affidavit would not be admitted, if the title is so deviant as to give rise to a serious doubt as to whether the affidavit was indeed sworn in that cause or matter or in some other cause or matter. In the present case, that could be no such doubt, as both originating summons and enclosure 1 are identically entitled – parties, case number, subject matter and all. Undoubtedly, enclosure 1 was properly entitled. to the letter and spirit of the law. In any event, as broad as it is long, encl. 1 has long been subsumed by several subsequent affidavits.

It comes to this, all procedural requirements have been complied, and there is no cause to the contrary. Accordingly, it is hereby ordered that the said land be sold by public auction, on 1 September 1999, to recover the sum of RM4,690,233.06 (the principal and interest due to the chargee at the date of the order for sale) and the interest accruing from this day. The learned registrar is directed to fix a reserve price and settle the terms and conditions of sale.